A

MESSRS LIP LEOW & ASSOCIATES

v.

JERAH BINA SDN BHD (IN LIQUIDATION); CIMB BANK BHD (INTERVENER)

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[COMPANIES (WINDING-UP) NO: D6-28-391-1999]
30 SEPTEMBER 2014

C

CIVIL PROCEDURE: *Jurisdiction - High Court - Setting aside - Whether one High Court has jurisdiction to set aside order of another court of concurrent jurisdiction - Whether judge had become functus officio*

D

CIVIL PROCEDURE: *Estoppel - Consent judgment - Consent judgment signed on another occasion in same case - Whether liquidator estopped from raising issue of jurisdiction*

COMPANY LAW: *Liquidation - Company wound-up - Leave to commence action against liquidator - Whether applicant had done enough* E *to protect interest - Whether applicant legal and lawful assignee of properties - Companies Act 1965, s. 233(2)*

The respondent, Jerah Bina Sdn Bhd, was the developer of Villa Duta Condominium, on a land which was originally charged to F MBf Finance Bhd. Rights, interests, benefits, titles and securities of MBf Finance Bhd was later taken over by Pengurusan Danaharta Nasional Bhd ('Danaharta Nasional') and pursuant to s. 57 of the Pengurusan Danaharta Nasional Berhad Act 1998, Danaharta Nasional had sold units of property in the Villa Duta G Condominium, two of which are the subject of this application ('the said properties'). The purchasers for each unit of the said properties had obtained a loan from Bumiputra-Commerce Bank Bhd and Southern Bank, respectively towards financing the purchase. When the deeds of assignment were executed in 2001, H the respondent had already been wound up by the court on 7 July 1999 and the Official Receiver was appointed as the provisional receiver. The respondent had gone through several receivers/liquidators before the current liquidator was appointed in 2005. In 2007, the court had granted an order for the said I properties to be vested in the liquidator with the power to sell and deal with the properties as specified in the schedule attached

to the vesting order. Another order was granted in 2009 to confirm that the vesting order was valid and binding against any third party and/or financial institution. The said properties were then sold pursuant to the two orders. CIMB, through a merger between itself, Bumiputra-Commerce Bank Bhd and Southern Bank, became the legal and lawful owner of the said properties, and contended that it was not aware of the application made by the liquidator in respect of the properties. It then applied to the High Court as an intervener for several orders, *inter alia*, (i) that they be granted leave to file the application; (ii) that the said properties be excluded from the schedule of the vesting order; (iii) that the legal and/or beneficial ownership over the said properties shall not vest in the liquidator of the respondent; (iv) that the applicant be declared as the lawful assignee of the said properties pursuant to the existing deed of assignment; and (v) alternatively, the liquidator shall pay compensation to the applicant for the amount equivalent to the market value of the said properties. Two main issues that were raised in the application were on jurisdiction and on the merits of the application itself.

Held (allowing notice of motion):

(1) On the jurisdictional issue, whether it involved a litigated matter or a consented matter, a party could not intervene where the proceedings have been concluded in a judgment granted by the court and the judge had become *functus officio*. However, a jurisdictional issue became an issue if it was raised by the parties. The liquidator's conduct of entering into a consent judgment had estopped him from raising the issue of jurisdiction. The liquidator could not simply raise the issue of jurisdiction on one occasion and then enter into a consent order in another occasion in the same case on similar facts and prayers. The applicant had legitimate expectation that his application would not be resisted simply on jurisdictional issues when the parties had earlier entered into a consent order while ignoring the jurisdictional issue. (paras 20-21 & 23)

(2) Under s. 233(2) of the Companies Act 1965, only properties which legally belong to the company shall vest with the liquidator, otherwise they must be excluded from the vesting order. Based on the documents, the applicant had been absolutely assigned with the rights, benefits and interests in the said properties, and therefore, the said properties did not belong to the respondent. The applicant did what they could

to protect their interests (*North Malaya Engineers Trading Co Sdn Bhd v. Aik Aik Holdings Sdn Bhd*, dist). The Insolvency Department had also issued a letter of no objection to the applicant's application to foreclose one of the said properties. The liquidator should have made more efforts instead of just sending one letter to ascertain the interests of all parties with regards to the said properties, and should have diligently checked with the previous liquidator and the Insolvency Department on the status of the said properties. Therefore, there were merits in the present application. (para 26)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(foll)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(refd)***

North Malaya Engineers Trading Co Sdn Bhd v. Aik Aik Holdings Sdn Bhd [2014] 4 CLJ 629 HC ***(dist)***

Resolution Alliance Sdn Bhd v. Jerah Bina Sdn Bhd (In Liquidation) OS: 24NCC-85-03-2012 (Unreported) ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 233(2), 236(2)

Pengurusan Danaharta Nasional Berhad Act 1998, s. 57

For the applicant/intervener - Norasidi Nadziruddin; M/s Che Mokhtar & Ling

For the liquidator - Sabrina Santhini Richards; M/s Hakem Arabi & Assocs

Reported by Lyana Shohaimay

JUDGMENT

Azizah Nawawi J:

Application

[1] This is an application filed by the applicant/intervener ('applicant'), CIMB Bank Bhd for the following orders:

(a) that the applicant be granted leave to file this application;

(b) that the vesting order dated 15 November 2007 ('the vesting order') and the order dated 30 November 2009 ('the order dated 20 November 2009') be varied, whereby the properties,

unit E-1-2 and unit E-12-3A, Villa Duta Condominium ('the said properties') be excluded from the relevant schedule of the said vesting order and the order dated 15 November 2009;

(c) that the legal and/or beneficial ownership of the said properties shall not vest in the liquidator of the respondent company;

(d) that the liquidator of the respondent company, Jambulingam a/l Sethuraman - Raki ('the liquidator') shall have no power to sell, transfer, lease, charge and/or deal with the said properties pursuant to s. 236(2) of the Companies Act 1965;

(e) that the subsequent sale and purchase agreement entered into between the liquidator and the respondent company and any third party in relation to the said properties be declared null and void;

(f) that the applicant, CIMB Bank Berhad be declared as the lawful assignee of the said properties pursuant to the existing deed of assignment;

(g) alternatively, that the liquidator shall pay compensation to the applicant for the amount equivalent to the market value of the said properties.

The Salient Facts

[2] The respondent company ('the company') was the developer of the Villa Duta Condominium, on land which was originally charged to MBf Finance Berhad.

[3] Pengurusan Danaharta Nasional Berhad ('Danaharta Nasional') took over the rights, interest, benefits, titles and securities of MBf Finance Berhad. Pursuant to s. 57 of the Pengurusan Danaharta Nasional Berhad Act 1998, Danaharta Nasional had sold the said units.

[4] Unit E-1-2 was sold by Danaharta Nasional to Ramesh a/l Radhakrishnan and Chandra Vathana a/p Ramachandran on 25 September 2000 for the purchase price of RM135,000. Unit E-12-3A was sold to Thor Beng Boon and Ng Suan Sim.

[5] The said purchasers had obtained a loan from Bumiputra-Commerce Bank Bhd and Southern Bank respectively towards the financing of the said purchases.

[6] Upon the execution of the loan agreement, power of attorney and the deed of assignment by the purchasers, the loans were released to Danaharta Nasional for the payment of the sale of said properties.

[7] When the deeds of assignments were executed in 2001, the respondent had already been wound up by the court on 7 July 1999, and the Official Receiver was appointed as the provisional receiver.

[8] On 23 November 2000, Mr Lim Tian Huat from Messrs Arthur Anderson & Co was appointed the Liquidator of the respondent company.

[9] On 27 April 2005, the current liquidator was appointed as the liquidator to substitute Mr Lim Tian Huat and the official receiver.

[10] On 15 November 2007, the court granted an order vesting the said properties together with other units in the liquidator and the liquidator was granted the power to sell and deal with all the properties specified in the schedule.

[11] On 30 November 2009, the court granted an order to confirm the vesting order as valid and binding against any third party and/or financial institution.

[12] Pursuant to the vesting order and the order dated 30 November 2009, both properties were sold to Wong Yien Kim on 25 August 2011.

[13] The applicant contends that as the legal and lawful owner of the said properties, it is not aware of the application made by the liquidator in respect of the said properties.

The Findings Of The Court

[14] There are two issues raised in this application, an issue on jurisdiction and on the merits of the application itself.

(i) Jurisdictional Issue

[15] The first issue raised by the liquidator is that this court has no jurisdiction to vary the vesting order and the order dated 30 November 2009 granted by another High Court of concurrent jurisdiction. This is premised on the decision of the Federal Court

in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. In *Badiaddin*'s case, the Federal Court held that one High Court cannot set aside a final order obtained from another High Court of concurrent jurisdiction. In the present application however, it is not to set aside the vesting order, but to vary the same so that the applicant's properties can be excluded from the schedule.

[16] Learned counsel for the liquidator also submitted the decision of the Federal Court in *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121; [2008] 2 MLJ 622 for the proposition that a party cannot intervene where the proceedings have been concluded in a judgment granted by the court and the judge had become *functus officio*.

[17] This court accepts and is bound by the principles enunciated by the apex court in the above case. But what bothers this court is whether the liquidator can raise the jurisdictional issue when he has entered into a consent judgment with the applicant in similar factual matrix but involving another unit of Villaria Condominium.

[18] It is not in dispute that in this very case (D6-28-391-1999), on 13 April 2010, the same parties have entered into a consent judgment which reads as follows:

> UPON THE APPLICATION of the abovenamed Applicant/ Intervener AND UPON READING the Notice of Motion dated 12th November 2009, Affidavit in Support duly affirmed by Ariffin bin Mansor @ Mohd Salleh on 11th November 2009, Affidavit In Reply duly affirmed by Jambulingam Senthuraman - Raki on 22th December 2009, the Intervener's Affidavit In Reply duly affirmed by Ariffin bin Mansor @ Mohd Salleh on 8th January 2010, Second Affidavit In Reply duly affirmed by Jambulingam Senthuraman - Raki on 25th February 2010, Intervener's Submission dated 4th March 2010 and Respondent Liquidator's Written Submission dated 4th March 2010 AND UPON HEARING Encik Hizri Bin Hassan, solicitors for the Applicant/ Intervener and miss Sabrina Richards, solicitors for the Respondent's Liquidator IT IS HEREBY ORDERED that the Applicant/Intervener's application is allowed as per the following:
>
> (a) that CIMB Bank Berhad (13491 - P) be granted leave to intervene in this proceedings;

A (b) that the Vesting Order dated 15/11/2007 be varied whereby the property particularly described as Parcel DG-W3, Villaria Condominium in Schedule 1 of the said Vesting Order be excluded and shall not vest in the Liquidator of the Respondent Company on condition as stated below herein;

B (c) that the Liquidator shall pay the sum of RM60,000.00 to CIMB Bank Berhad as full and final settlement for the said parcel DG-W3, Villaria Condominium to Intelligent Wonder Sdn Bhd;

(d) no order as to cost.

C

Dated this on 13th day of April 2010 (emphasis added)

[19] With regards to the consent order, in the respondent liquidator's further written submission, in para. (3), it is submitted that:

D

3. The previous Order dated 13th April 2010 is a Consent Order and the subject matter was not litigated upon. This is evident from the letter dated 7th April 2010 enclosed as exhibit "JR-4" in the Second affidavit in Reply affirmed by Jambulingam Senthuraman Raki on 27th February 2013 for Unit No. E-1-2 and also Unit E-12-3A.

E

[20] I am of the considered opinion that on the jurisdictional issue, whether it involves a litigated matter or a consented order, a party cannot intervene where the proceedings have been F concluded in a judgment granted by the court and the judge had become *functus officio*.

[21] However, a jurisdictional issue become an issue if it is raised by the parties. In the consent order dated 13 April 2010, the G liquidator did not raise any jurisdictional issue in an application by the applicant seeking the same prayers, but involving different buyers and unit. The issue then is whether the liquidator is estopped from raising the jurisdictional issue when they have entered the consent judgment earlier in the same case, on similar H facts and prayers.

[22] The law on estoppel has been clarified by the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where it was held as follows:

I

The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of

wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless ...

We would add that it is wrong to apply the maxim "estoppel may be used as a shield but not a sword" as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russel of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100, 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of same facts essential to establish the cause of action or (to put) it in another way by preventing a defendant from asserting the existence of which would destroy the cause of action.

It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non existence of a fact.

The decision of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representation not of fact but of law.

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at page 122) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair*

A *or unjust to allow him to do so.* If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands. (emphasis added)

[23] Premised on the principle above, I am of the considered opinion that by the liquidator's conduct of entering into a consent judgment on 13 April 2010, the liquidator is estopped from raising the issue of jurisdiction. The liquidator cannot simply raise the issue of jurisdiction on one occasion and then entered into a consent order on another occasion within the same case. The applicant has a legitimate expectation that his application will not be resisted simply on jurisdictional issue when parties had earlier entered into a consent order, blissfully ignoring the jurisdictional issue.

(ii) The Merits Of The Application

[24] It is the submission of the liquidator that the applicant was clearly lackadaisical in protecting their alleged interests in the properties. They have failed to respond to the verification exercise based on letters and/or 'three advertisements in the newspaper that is akin to notice to the whole world'. The liquidator also states that he did not have any notice of the applicant's alleged interests and that the applicant is guilty of laches in prosecuting its claims.

[25] The liquidator relied on the cases of *North Malaya Engineers Trading Co Sdn Bhd v. Aik Aik Holdings Sdn Bhd* [2014] 4 CLJ 629 and *Resolution Alliance Sdn Bhd v. Jerah Bina Sdn Bhd (in Liquidation)* in OS: 24NCC-85-03-2012. In both cases similar applications were rejected by the courts.

[26] However, having considered the facts of the application and the submission of the parties, I am of the considered opinion that there are merits in this application. My reasons are as follows:

(i) Under s. 233(2) of the Companies Act 1965, only property which legally belonging to the company shall vest in the liquidator. Therefore, if the properties do not belong to the company, then the same must be excluded from the vesting order.

(ii) From the loan agreement, power of attorney and the deed of assignment, I am satisfied that the purchasers have absolutely assigned the rights, benefits and interests in the said properties

to the applicant under cl. 1 and 3 of the respective deeds of assignment. Clause 1 of the feed of assignment for Unit E-1-2 dated 16 August 2001 reads as follows: A

> 1. The assignor as beneficial owner hereby assigns unto the Bank absolutely all the rights, title and interest of the assignor in and to the said Property with full benefit granted thereby all stipulations therein contained and all remedies for enforcing the same. B

Clause 3 of the deed of assignment for unit E-12-3A dated 21 September 2001 reads as follows: C

> 3. Covenant to Pay
>
> The Assignor(s) shall pay to the Bank the Secured Debt at the times, in the manner and on the terms and conditions provided in the Security Documents. D
>
> For the consideration aforesaid, the assignor(s) as the beneficial owner HEREBY ASSIGNS ABSOLUTELY unto the bank:
>
> > (a) all rights, interests, benefits advantage permit licenses and remedies of the assignor(s) in under or arising out of the Sale and Purchase Agreement; and E
> >
> > (b) all estate rights, titles and interests of the assignor(s) in and to the Property pursuant to under or arising out of the Sale and Purchase Agreement. F

Therefore, the applicant is the legal assignee of the said properties and the said properties do not belong to the company.

G

(iii) Pertaining to the liquidator's allegation on the alleged lackadaisical attitudes of the applicant, I am of the considered opinion that the applicant had done what they could to protect their interests. The first liquidator of the company, Mr Lim Tian Huat from Messrs Arthur Anderson & Co has issued letters of undertaking confirming the status of the applicant as the legal and lawful assignee of the said properties and undertook not to create any encumbrance over the said properties. (see letter dated 8 May 2001 for Unit E-1-2 and letter dated 13 September 2001 for Unit E-12-3A). H I

The Insolvency Department, which took over from Mr Lim Tian Huat, has also issued a letter of no objection on 12 April 2005 informing the applicant's previous solicitors, Messrs Azim Tunku Farik & Wong that they have no objection to the applicants application to foreclosed Unit E-12-3A.

Therefore the interests of the applicant in the said properties were already within the knowledge of the previous liquidator and the Insolvency Department. On the liquidator's assertion that he has made a request for documentation from the Official Receiver in a letter dated 5 May 2005 but received no response from the latter, I am of the considered opinion that the liquidator should have made more efforts instead of just sending one letter. Reminder letters should have been issued as the subject matter involves the properties of other parties. Surely a prudent liquidator would want to ascertain the relevant documents in the possession of the previous liquidator and the Insolvency Department in order to ascertain the interest of all parties.

As such, I agree with the submission of learned counsel for the applicant that since the liquidator, having been appointed to step into the shoes of the previous liquidator, he should have the known and/or deemed to have/knowledge about the status of the assignment of the said properties. The liquidator should have diligently checked with the previous liquidator and the Insolvency Department on the status of the said properties.

Relying on 'three advertisements in the newspaper that is akin to notice to the whole world' does not mean that the liquidator can omit and/or failed to conduct a proper and thorough verification exercise and/or proof of ownership. This is clearly evidenced from the consent order dated 13 April 2010 where the liquidator has agreed vary the vesting order to exclude the properties that was mistakenly entered into the schedule. In such a case, mistakes do happen and it is only proper that the applicant be compensated for the loss of its property.

(iv) On the application of the cases of *North Malaya Engineers Trading Co Sdn Bhd (supra)* and *Resolution Alliance Sdn Bhd (supra)*, I am of the considered opinion that both cases are clearly distinguishable on the factual matrix. In *North Malaya Engineers Trading Co Sdn Bhd*, the applicants failed to provide

the relevant documents requested by the liquidator within the time specified. Since the said applicants failed to provide the required documents, the liquidator proceeded to apply for the vesting order. In *Resolution Alliance Sdn Bhd*, the court held that:

> (51) ... saya berpendapat adalah tidak adil berdasarkan prinsip ekuiti bagi membenarkan kepentingan beneficial plaintiff **yang tidak dituntut** sebelum perintah perletak hak ... (emphasis added)

In the present case, the applicant had already given notice of their rights to the said properties to the previous liquidator. Relevant documents have already been given which led to Mr Lim Tian Huat (the first liquidator) to issue letters of undertaking confirming the status of the applicant as the legal and lawful assignee of the said properties and undertook not to create any encumbrance over the said properties.

[27] In the premise, based on the reasons above, the notice of motion is allowed in terms of prayer (a), (b), (c), (f) and (g) is to be assessed by the Senior Assistant Registrar and cost.